

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-2134

To be argued by
DAVID L. BIRCH

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, ex rel. :
PAUL T. ROGERS, :

Petitioner-Appellant, :

-against- :

J.J. NORTON, Superintendent, :
Federal Correctional Facility, Dan- :
bury, Connecticut; PAUL REGAN, :
Chairman, New York State Board of :
Parole; and PETER PREISER, :
Commissioner of Correction, State :
of New York, :

Respondents-Appellees. :

-----X

[APPEAL FROM THE UNITED
STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF NEW YORK]

BRIEF FOR RESPONDENTS-APPELLEES
REGAN AND PREISER

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New York State Board of Parole;
and PETER PREISER, Commissioner of :
Correction, State of New York,

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BRIEF FOR RESPONDENTS-APPELLEES
REGAN AND PREISER

Preliminary Statement

Petitioner-appellant appeals from a decision of the United States District Court for the Southern District of New York (Pierce, J.), dated July 10, 1975, denying without a hearing petitioner-appellant's application for a writ of habeas corpus. On August 4, 1975, the District Court (Pierce, J.) granted a certificate of probable cause.

Questions Presented

1. Did the receipt of a parole revocation hearing cure any alleged prejudice that may have occurred to petitioner? Do the facts demonstrate that petitioner suffered no prejudice?

2. In any event should the District Court have dismissed the petition for failure to exhaust state remedies?

Statement of Facts

At the time of the filing of this brief, petitioner is incarcerated in the Green Haven Correctional Facility, Stormville, New York pursuant to a judgment of conviction imposed by the Supreme Court, New York County (Murtagh, J.) in June 1968 after a plea of guilty to robbery, first degree; robbery second degree; grand larceny, second degree; assault second degree; and possession of a weapon. Petitioner was sentenced to five concurrent sentences, the longest of which is ten years.

Petitioner was paroled on June 21, 1971 with a scheduled maximum expiration date of September 24, 1977. He was arrested by the Federal authorities on April 18, 1974 accused of stealing a Treasurer's check from the mail.

The New York Board of Parole declared the petitioner delinquent on June 13, 1974 as of April 6, 1973, the date of the crime to which petitioner pleaded guilty (possession of stolen mail) on June 21, 1974 in the United States District Court for the Southern District of New York (Pierce, J.). On

October 23, 1974, petitioner was sentenced to a term of eighteen months.

In a petition for a writ of habeas corpus, sworn to November 12, 1974, brought in the Supreme Court, New York County, petitioner requested an order voiding the New York State parole detainer outstanding against him and restoring him to parole.

On December 20, 1974, the Supreme Court (Roberts, J.) ordered that petitioner be afforded a final revocation hearing within thirty days, or, in the alternative, that the parole warrant be revoked.

The parole revocation hearing was held timely in accordance with this order, and on January 28, 1975, the Parole Board determined to revoke petitioner's parole.*

In a petition sworn to January 9, 1975, petitioner then applied to the United States District Court for the District of Connecticut for a writ of habeas corpus alleging that he was entitled to have the parole detainer lifted since the State Parole Board had not provided him a timely revocation hearing.

*The minutes of the hearing are annexed hereto as an appendix. They were presented to the District Court as an appendix to the affidavit in opposition.

In a Memorandum Decision filed January 29, 1975, the Court (Zampano, J.) dismissed the petition without prejudice to an application in the proper forum.

Petitioner then presented the same claim to the United States District Court for the Southern District of New York in an application filed March 7, 1975.

In an order dated July 10, 1975 the District Court (Pierce, J.) endorsed the report of Magistrate Jacobs dated May 16, 1975 refusing to decline jurisdiction for failure to exhaust state remedies but denying the petition since petitioner did not show that the conduct of his parole revocation hearing was prejudiced by the delay.

The Court below granted a certificate of probable cause on August 4, 1975.

Petitioner was returned to the custody of New York State on June 4, 1975. On November 20, 1975 he met with the New York State Board of Parole and was granted an "Open Date Own Program" effective December 24, 1975. Assuming he has a satisfactory program, petitioner will be released on parole on that date.

POINT I

RECEIPT OF A PAROLE REVOCATION
HEARING CURED ANY ALLEGED
PREJUDICE THAT MAY HAVE ACCRUED
TO PETITIONER. IN ANY EVENT, THE
FACTS DEMONSTRATE PETITIONER
SUFFERED NO PREJUDICE.

In United States ex rel. Blassingame v. Gengler, 502 F. 2d 1388 (2d Cir. 1974), this Court stated that "the clear law of the Circuit is that a [fair parole revocation] hearing renders an [inmate's] custody lawful." (emphasis supplied) 502 F. 2d at 1388.

In Blassingame, the Court cited United States ex rel. Buono v. Kenton, 287 F. 2d 534 (2d Cir.) cert. den. 368 U.S. 846 (1961) where "prejudice" was defined as prejudice to the conduct of the parole revocation hearing.

Here, petitioner was not prejudiced in the conduct of his revocation hearing. He admitted the charge that formed the basis of the revocation. If there were any effect on the hearing it was to enhance petitioner's defense since he was able to present more evidence of his recent prison behavior and of the favorable sentencing he received on the Federal charge.

Petitioner's claim that the delay in holding the revocation hearing adversely affected his federal sentence is completely without merit. First, petitioner was not sentenced on the federal conviction until October 23, 1974. The revoca-

tion hearing was held approximately three months later. By his own admission at the parole revocation hearing (see Minutes, p. 3), petitioner did not meet the Federal Parole Board until February 18, 1974, almost three weeks after the New York Parole Board revoked his parole. The only prejudice to the conditions of petitioner's confinement could have been in the three month period between his federal sentencing and the revocation of his New York parole. Since petitioner did not meet the federal parole until after the New York Parole Board revoked his parole, so in fact, the delay caused no prejudice to the serving of his federal sentence.

Second, since petitioner admitted the charge against him, the revocation hearing consisted solely of petitioner's presentation of character references in support of his claim that he did not deserve to be reincarcerated. He presented almost no material in mitigation of the crime itself. The material he did present would have undoubtedly resulted in the same determination of the Parole Board, i.e., revocation, no matter when he presented his case. The Federal Parole Board decided to keep petitioner an additional four months. Since petitioner was arrested in April 1974, the Federal Parole Board kept petitioner 14 months out of a total sentence of eighteen months.

It is clear beyond cavil that no matter when petitioner had his New York parole revocation hearing, his

parole would have been revoked. It is equally clear that no matter when that revocation occurred, the Federal authorities would have kept petitioner for the bulk of his Federal sentence.

Since petitioner was arrested on the Federal charge on April 18, 1974 (Brief, p. 3) and was given an eighteen month sentence, his maximum expiration date should have been in October, 1975. Petitioner claims that the New York parole detainer precluded him from participating in various special programs during the last nine months of his federal term. That last nine month period, however, did not begin until approximately 10 days before the New York Parole Board revoked his parole. So any prejudice was de minimus.

Thus, the timing of petitioner's State hearing in no way prejudiced the conditions of his federal sentence.*

*Smith v. Hooey, 393 U.S. 374 (1969), its progeny and the Interstate Agreement on Detainers, (18 USC, Appendix and New York Criminal Procedure Law, Article 580) are inapposite since they involve the right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution.

Since petitioner did receive a revocation hearing before completion of his Federal Sentence, postponement of such hearings until return to New York is not squarely presented by this case.

POINT II

IN ANY EVENT, THE DISTRICT COURT
SHOULD HAVE DISMISSED THE PETITION
FOR FAILURE TO EXHAUST STATE
REMEDIES.

Petitioner asserts (Brief, p. 26-27) that he was excused from exhausting his state remedies in the state appellate courts because any relief would have come too late to affect his Federal imprisonment. Yet, he perfected his appeal in this Court nearly six months after being returned to the custody of New York State claiming that he is entitled to have the parole detainer warrant vacated. This claim was pursuable in the state appellate courts.

Moreover, petitioner's professed needs for an expedited decision leaves unexplained the fact that he did not move for an expedited appeal in the state courts under CPLR 5521.*

In short, petitioner's refusal to appeal the decision of the New York Supreme Court on the ground that it would take too long does not excuse his failure to exhaust his state remedies. Required exhaustion of state remedies under 28 USC § 2254(b) does not occur until a claim has been presented to

*Petitioner was represented by counsel in the State habeas proceeding.

a State's Appellate Court. United States ex rel. Carter v. York, 430 F. 2d 1329 (2d Cir. 1970); United States ex rel. Griffin v. Martin, 409 F. 2d 1300 (2d Cir. 1969) Only where the State appellate court is guilty of inordinate and unjustifiable delay can the District Court excuse exhaustion of State appellate remedies. United States ex rel. Goodman v. Kehl, 456 F. 2d 863 (2d Cir. 1972). This Court has held that a delay of almost four years from the filing of a notice of appeal until the hearing of the petitioner's case by the State appellate court does not indicate that a state remedy is absent or ineffective. Ralls v. Manson, 503 F. 2d 491 (2d Cir. 1974).

Before an applicant for federal habeas relief can be excused from exhausting his state remedies, he must demonstrate that the State appellate courts were guilty of unjustifiable delay. Petitioner cannot, on his own, decide that the state courts will delay his relief, especially where, as here, he has made no attempt to present his claims to the appellate court.*

*If appeal from Justice Woods decision is no longer available, petitioner presumably could apply again for habeas corpus relief pursuant to CPLR, Article 70.

If, as expected, petitioner is released on parole on December 24, 1975, he will have received the relief that he requested in the District Court. No definite and concrete controversy between the parties will be left. The resolution of the issues presented to this Court could then not affect the rights of the litigants, and the action should be dismissed as moot. Preiser v. Newkirk, 422 U.S. 375 (1975); DeFunis v. Odegard, 416 U.S. 312 (1974); Lunz v. Preiser, _____ F. 2d _____, Docket No. 75-2059, slip op. no. 125, p. 201 (2d Cir., October 14, 1975).

CONCLUSION

THE OPINION OF THE DISTRICT
COURT SHOULD BE AFFIRMED.

Dated: New York, New York
December 22, 1975

Respectfully submitted,

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of Counsel

APPENDIX

ATTORNEY: Donald Zuckerman

COMM. RIVERA

In the matter of Paul Rogers' hearing, I've been advised by our staff, Mr. Zuckerman, that you have a motion for postponement to submit. To be advised here, sir, that we only grant these postponement for cause inasmuch as we have produced the parole officer and are ready to proceed, we'd like to hear the merits of the course of your motion and I'd like that on the record. Are you the attorney of record?

COUNSEL:

William E. (Howarsteenans?), Donald Zucker of the attorneys of course and all cases handled by the Parole Revocation Defense Unit of the Legal Aid Society. This case was assigned to Howard Schwartz (phonetic) of our office and he is currently on vacation. I enter my appearance and then I will make my application and you may make your ruling.

COMM. RIVERA:

Of course.

COUNSEL:

First, I am Donald Zuckerman, Legal Aid Society, Parole Revocation Defense Unit, 15 Park Row, New York 100038. Now this case arises subsequent to a habeus corpus determination in Supreme Court, New York County by the Honorable George Roberts by which order dated late December 1974, Justice Roberts directed that the board afford Mr. Rogers currently serving a federal sentence at Danbury Correctional Institution a speedy revocation hearing within thirty days or in the alternative the court would indeed vacature of the New York State Warrant. As a result of that, I have no wish to inconvenience the board and I apologize for any resulting thereby, but I felt ethically, it would be improper to Mr. Schwartz's client for me to make application for adjournment until such time the board show good faith in complying with the order by arranging for a hearing to be conducted within thirty days. And the board has done that and we will waive at this point, should this hearing be adjourned any application, any claims that Mr. Rogers has been denied a speedy hearing. In other words, you have shown your good faith. You have arranged for a hearing to be conducted within thirty days.

COMM. RIVERA:

I appreciate your acknowledging that for the record.

COUNSEL:

I certainly feel I must, Comm. Rivera. As I say, I know it is not easy to move an inmate from one institution from a different jurisdiction into the state and at the same time, attorneys are often criticized for sometimes having strange codes of ethics that the public doesn't quite understand. I felt the duty to Mr. Rogers was parallel and I could not subsume that duty by going ahead and vying the board that we may be in the position of adjournment because if the board failed to comply, you know and I know, that I would have been in State Supreme Court saying you failed and the warrant would have been vacated. Now, we're faced with a problem today that Mr. Schwartz is still out of the country in fact and will be returning within the next couple of days.

COUNSEL:

Mr. Rogers is currently serving a short, I believe nine months federal sentence at Danbury Correctional Institution. His desire, basically, is to proceed today pro se and if our application would not be for an adjournment after we consulted on this point, but basically, to sit here in an advisory capacity, I feel I would be rendering in effect, assistance since this case is not mine and I have not prepared it. I don't feel I can give affective assistance of counsel to sit here and proceed to conduct a hearing.

COMM. RIVERA:

Well, in the best interest of your client, why not proceed with a motion of postponement and when he returns with a counsel of record, who knows of the case and prepared--

COUNSEL:

That's my personal view, Commissioner.

COMM. RIVERA:

I share that view with you and in reciprocation indicate the good faith you spoke about, we would like to grant the motion should you move to that effect, but I am a bit confused since that direction in which I thought the thrust of your statement was and then you confused me when you said you wanted to proceed pro se. So, let's clear up that first. We are ready, one way or the other and the best interest of your client and the good faith we would grant an adjournment, should the motion be made to that effect, but proceed and let me--

COUNSEL:

What I would like to say is obviously to enter--and the wishes of my client must dictate. In terms of my views of how to conduct the case and obviously the attorney's views will prevail, but in terms of the decision whether to proceed at this time and endure additional incarceration under the warrant, that decision is, I feel is Mr. Rogers. And if he may address you.

COMM. RIVERA:

May I ask you, sir, having heard what transpired so far, may I suggest Mr. Rogers that you take another minute and take you attorney into your confidence and reconsider the matter of your procedure pro se and let us know what you want to do.

COUNSEL:

Shall we consult?

COMM. RIVERA:

You can do it here or go in the private room.

INMATE:

May I address the board, Commissioner?

COMM. RIVERA:

You can do it for the record or in private.

INMATE:

For the record.

COMM. RIVERA:

Proceed.

00 2 INMATE:

Not to take up your time, I would like to join Mr. Zuckerman in expressing my appreciation for the fact that the board did comply

with the order and I realize it is a great deal of difficulty getting me here. That statement, I think, relates to my feeling about prose today and that is that given the dependancy of this parole warrant, which I realize is my making and not the board, that this point there is substantial difficulties being created for me in terms of serving my federal sentence. One of these has to do with the fact that I am supposed to appear before the federal board of parole on February 18, should this matter today be adjourned for the next board meeting at Green Haven, the federal parole board would not entertain my application.

COUNSEL:

I have a suggestion that just occurred to me, Comm. Rivera and we would comply in terms of transporting our attorney wherever necessary should a board be meeting anywhere in the state. Early in the month of February prior to the federal board meeting it seems to me if the difficulty of getting Mr. Rogers back from Danbury, it's no worse than getting into Attica or Auburn or wherever you're meeting, Mr. Schwartz will be returning February 3. The board is sitting that week or the following week, we can arrange for Mr. Schwartz to be present.

COMM. RIVERA:

We sit in different institutions and the transporting of Mr. Rogers back and forth poses a problem that the parole board can not control

COMM. GILBRIDE:

Mr. Zuckerman, you say it is no problem transporting Mr. Rogers around the country at may be a little problem for us to transport a parole officer around the country. I just wanted to ask this one question. Are you going to contest the conviction or mitigate?

COUNSEL:

We'll mitigate. We'll waive production of the parole officer.

COMM. GILBRIDE:"

Is it necessary to have the parole officer here?

COUNSEL:

No, sir.

COMM. GILBRIDE:

I think we can work a lot better under those circumstances, knowing the parole officer wouldn't have to be available.

COMM. RIVERA:

From what your response is to Comm. Gilbride's question, it seems to me that the interest of all parties will be best served if we proceed today. If we were to proceed today, we have the parole officer here there's no question about the availability of either the subject or you and to sit, if not as counsel record in that capacity, I don't know that the situation will be any different the next time we meet other than the action taken by the federal authorities and our decision in this violation of parole is not going to be based entirely on whatever happens in the federal sitting. This is entirely jurisdiction as you well know.

COUNSEL:

Right.

COMM. RIVERA:

However, the violation has to do strictly with the involvement in the federal offense.

COUNSEL:

Comm. Rivera, there is no question that today or at the hearing it-

self Mr. Rogers will admit, will not contest in any way the existence of any federal conviction. He will admit his guilt, there is no dispute as to that, but the point is, as you pointed out before, Mr. Schwartz is absent. He is the counsel of record. The counsel was prepared and can present the facts in the most orderly fashion and present the mitigating evidence which you recognize must be present under the Morrissey decision add present it in an organized fashion. He is not here, since he will be back within a few days and we will deal with the problem if an adjournment would be granted for Green Haven and he had to go to Danbury, what I am suggesting if he can go to any other panel before the 18th--

COMM. GILBRIDE:

I don't think that panel can make that decision. We can adjourn it on your request any other place that you want to conduct a hearing would have to be approved by the chairman of the board and you'd have to be in contact with him. We have no objection.

COUNSEL:

I'll be back tomorrow conducting two of my hearings before you. May we approach Chairman Regan in the interim?

COMM. RIVERA:

May I suggest for the record if your client is prepared to present explanations in mitigation to this obvious admission which you have made before us today and for the record I doubt that counsel can help him explain in mitigation any or that he can himself so if you want to proceed in the mitigation and explanation phase, let me hear from him. Do you want to proceed.

INMATE:

I don't like to disagree with Mr. Zuckerman in public, but if I may complete my initial statement.

COMM. RIVERA:

I am trying to dispose of an exercise of utility. We have an obvious conviction and admission and I'm trying to eliminate the unnecessary delay. We're ready to proceed. You appear before us not only convicted, but with an obvious admission. Let's not waste our time and proceed. However, in all fairness to your legal rights, we will grant the adjournment, but not on your turn, because we can not meet your turn because we don't control the movement of parolees or inmate population. Much more so, those that are doing time in a federal setting. If we controlled this matter, it would be six months or earlier and that is up to you and the attorney to produce you at that time.

COUNSEL:

May we consult for wne moment?

COMM. RIVERA:

Of course.

COUNSEL:

We'll proceed.

COMM. JONES:

Who's responsibility was it to get this gentleman here in the state? Was it New York's responsibility?

COUNSEL:

That's right and New York has complied Mr. (Sokoloff-?)

COMM. RIVERA:

The responsibility was to give him the hearing, not to transport him. I think the lady commissioner is a bit confused about the mechanics of the producement of your subject. One thing is for us to be avail-

able and give him a timely hearing and another thing is for us to provide the necessary transportation. Now this is two different issues here.

COUNSEL:

May I respond, Comm. Rivera?

COMM. RIVERA:

Of course.

COUNSEL:

Mrs. Jones asked a question, who's responsibility was it to get Mr. Rogers here. By letter early this month, Senior Parole Officer Irving Sokoloff asked our office to make the necessary arrangement and we replied by return letter indicating in our view it was the board's view to conduct a hearing and for that hearing it was to take place it was the board's duty to produce Mr. Rogers and the board has done so. There is no dispute as to his presence today. New York State arranged for his production.

COMM. RIVERA:

If we grant, are you ready to proceed?

COUNSEL:

Yes, I said that a moment ago after we consulted for about five seconds, I said we'll proceed.

COMM. RIVERA:

Thank you for your consideration of my suggestion, which I appreciate. Mr. Rogers, since by your own statement and admission you're not contesting the conviction or the involvement in the matter for which you were convicted in the federal setting and sentence proceed and submit for our consideration statements in mitigation thereof that you spoke about before. I'm sure--you waive, I'm sure to your admission, cross-examination of parole officer. Do you sir?

INMATE:

I do.

COMM. RIVERA:

Proceed.

COUNSEL:

May I say for the record that from this point onward, I will not participate directly in the conduct of the case because it is my position that I can not do effectively, but may I ask at this time permission to consult with Mr. Rogers for one moment before he proceeds?

COMM. RIVERA:

Yes. Before you proceed, counselor and Mr. Rogers, since there is no need for the parole officer to be present here, I'd like to excuse him from further participation in this hearing.

INMATE:

May I ask this prior to that, I assume that the final report of the parole officer is in?

COMM. RIVERA:

Yes, it is here.

INMATE:

Then I have no objections.

MR. PTALIS:

Thank you, good evening.

COMM. RIVERA:

Thank you for coming, Mr. Ptalis.

COMM. GILBRIDE:

When you say the final report, do you mean the change in sentence?

INMATE:

No, sir. I mean the final report of Mr. Ptalis and supervisor in terms--

COMM. RIVERA:

Indicating your present status in the sentence?

INMATE:

No, as well as the history on parole.

COMM. RIVERA:

We have everything here, sir. Go ahead.

INMATE:

If I may, perhaps take a little time, I would like to divide my presentation into perhaps four sections for the sake of convenience and perhaps it might be helpful to have Mr. Ptalis confirm some of the remarks. But I don't think it's necessary. In terms of some of the things relating to the conduct on parole--history on parole that do not appear in the records that were not part of the original record. To move in to the violation itself and to also discuss briefly perhaps in mitigation certain documents that I have with me pertaining to reports of various federal officials and people who have come in contact with me as well as discussing what the federal plans tentatively are for me, depending on what the actions of this board is. I don't think that this board has in front of it the--many of the reports prepared in the course of this case through the federal system. I have sent to Mr. Sutherland and Mr. Ptalis a blanket release. I don't know what was done with that and the federal authorities have a blanket release on file as well. So, should anything in this presentation--

COMM. RIVERA:

What do you mean by blanket release?

INMATE:

Any or all records in the possession of the federal authorities relating to me, anything of a confidential nature.

COMM. RIVERA:

Release of information?

INMATE:

Correct. So that I might preface my remarks with the observation that if there is need in the mind of any of the commissioners for verification of any particular statement that this is available and certainly without any opposition on my part and there are releases on file in both departments.

COMM. RIVERA:

Why don't you tell us for yourself. Speak for yourself and tell us what those reports contain and if you have them in writing, we will consider them, submit them.

INMATE:

I intend to, sir.

COMM. RIVERA:

If it is the only copies that you have, we will give them back to you.

INMATE:

I'm sure that Mr. Ptalis mentioned my work history on parole which I think--

COMM. RIVERA:

It's here before us.

INMATE:

Which is an improvement over what it was to my incarceration by the state. I also would like to point out that for the past year until the time of my arrest by the federal authorities, I have been seen by a private therapist on a paying basis for which I was paying and I thought I might briefly summarize and I prepared for the board, if I may, some of the other community activities of which I was engaged other than paid employment and if I may submit these to the board. May I just state for the record that I've handed to the commissioners a sheet entitled, "Community Activity 1971 to 1974, Paul Rogers".

COMM. RIVERA:

Does this pertain to the time that you were on supervision or prior thereto or thereafter?

INMATE:

This is the time directly on supervision from the time of release on parole to the time of--

COMM. RIVERA:

Let the record show this was submitted in writing, that we'll read it, consider it and afford it all due consideration.

INMATE:

In this respect, I just would like to point out on general area of my activity. I think reflected by the parole report and by this brief summary which pertains to the fact that I did make certain efforts during the time that I was released on parole to work with and for ex-convicts in terms of job development. I believe I was, hopefully, successful. I had just previously noted that in the report of March '74, Citizen's Inquiry on Parole and Criminal Justice, there was a statistic that 1970, New York Parole Officers helped obtain five hundred six jobs and I think if I may pay myself on the back, during the period '71 to '74, I think I alone was responsible for more than one hundred jobs for people coming from New York institutions.

COMM. RIVERA:

You mean from the correctional facilities?

INMATE:

Yes, sir.

COMM. RIVERA:

Was that during the period of time you were under supervision?

INMATE:

Yes, sir.

COMM. RIVERA:

Were you doing that under the supervision and advice and consent of your parole officer or on your own?

INMATE:

Yes, sir. Under the advice and consent of the parole officer.

COMM. RIVERA:
Proceed.

INMATE:

As a matter of fact, one of the projects which I was involved in in working directly with Mr. Ptalis was a federally funded project for \$360,000 for the operation of mainstream, which provided immediately twenty-five jobs for the Work Release Program in New York State as well as counting close to the number of one hundred (over a years.?) I also would like to submit to the board if I may, and I don't think I have triplicate copies, I'm sorry, a letter describing my job action it is by one brother, Timothy Jones, a Franciscan monk, assistant chaplain, children's village, Dobbs Ferry, New York. This one was written to Mr. Daniel Miller, casemanager, Penbrook Station, Danbury, Connecticut and I only have one copy.

COMM. RIVERA:

We will share it. Before we proceed, let's mark this exhibit one and two. First one is exhibit one and the one under my consideration now is number two for the respondent and let the record show that also there's only one copy and all three commissioners will share in the reading of it and give it all to consideration. Proceed.

INMATE:

I also have a letter from this same gentleman to a member of the Legal Aid Society staff, which is slightly different in content and perhaps it may speed matters up if I presented the other members of the commission with the letter. They are almost identical.

COMM. RIVERA:

All right. This is exhibit three a letter from Brother Timothy, addressed to Victoria Morgan, esq. Legal Aid Society. Not wishing to burden the record with the entire verbosity, let the record show that we will read this document in its entirety and give it all due consideration. Proceed.

INMATE:

I should also like to read for several reasons, certain excerpts from the minutes of the sentencing in the federal case which I'm now convicted. These pertain to two points. One relative to my activity while on parole and secondly to the possibility of employment on my eventual release.

COMM. RIVERA:

Your activities while on parole are reflected in the history of parole supervision, too, which we have before us.

INMATE:

Well, inasmuch as I have not read the report, I don't want to duplicate any material that you have.

COMM. RIVERA:

Your point is well taken. Proceed.

INMATE:

Thank you, sir. I will submit the entire minutes. Perhaps the record should show that I'm beginning on page two of the sentencing minutes just for the sake of brevity. However, I will hand up for your examination the entire set.

COMM. RIVERA:

Thank you.

INMATE:

I am beginning line 23 of the sentencing minutes. "The court inquiries of counsel. What do you have to present to the court in mitigation of sentence? Mr. Keegan, who is my attorney, your honor, I would like to say that Mr. Rogers--"

COMM. RIVERA:

Before we proceed, perhaps we can have some kind of an agreement now here. I know that if I suggest to you that we will take judicial knowledge of the fact that when a court modified this sentence from ten years to eighteen months there must have been mitigation, mitigating circumstances taken by the court in your favor which we grant. And that would perhaps obviate the necessity to go into the factual presentation of what we are taking judicial knowledge of. If you wish a minute to consult with Mr. Zuckerman, feel free to do so.

INMATE:

Thank you, sir. I would appreciate the opportunity to call some very specific things to the attention of--

COMM. RIVERA:

Proceed.

INMATE:

Continued from the minutes of sentencing on page three; "there is a Mr. Ralph Santiago in Court. I'd appreciate it if the court could listen to him for two or three minutes with respect of his last employment. The court: All right, come up sir. What is your name, sir? MR. SANTIAGO: Ralph Santiago. THE COURT: You are employed where? MR. SANTIAGO: I am director of the Puerto Rican-Hispanic Youth Coalition, a private agency founded by city state and federal funds. THE COURT: Mr. Paul Rogers was in the employ of that agency? MR. SANTIAGO: Yes, sir. He was employed for a short period of time. THE COURT: How long? MR. SANTIAGO: I would say roughly, two months, two to three months that he had been. THE COURT: My records indicate one month. Would that be incorrect? MR. SANTIAGO: You may be correct. But Mr. Rogers has been associated with our agency for at least two years time on a voluntary basis in helping us with the problems and serving the communities that we do. In the time that he was with us, he was able to bring in our community three programs that dealt with the community needs. One was a day care nursery, which is now presently funded. The second was an alternative junior high school, which he contributed enough time of his own in getting that funded which is existing now. And just recently last week one of the other proposals was a group home for use which he also wrote and was approved for funding. As a former graduate of the Division of Youth, I think I know something of a person, I'd say that needs a chance to be given on the outside. The court: All right, does that complete your statement, sir? MR. SANTIAGO: Yes, sir, unless there are any questions. THE COURT: Thank you for coming. I'm glad to see you doing so well. MR. KEEGAN: What Mr. Santiago indicated to me earlier was that Mr. Rogers' ability as a graduate of the school of social research, his ability lies mainly in the area of writing proposals, new ideas of attacking old ideas in the community. Mr. Santiago has the ability to get the programs into effect. Mr. Rogers has the creative mind and I have read some of the things he has written and I can attest to that. He knows how to go about getting the funds that are needed. Mr. Santiago has even communicated with Mr. Rogers while he has been in prison. He has received calls from others seeking funds asking how to get in touch with Mr. Rogers in that regard. He further tells me that Mr. Rogers was working for that program on an annual salary

of \$74,000 per year. He could have gotten more at work in other parts and on several occasions, Mr. Santiago asked him, don't you want to further yourself? Don't you want to make more money? Mr. Rogers indicated that this was what he like to do and he wanted to stay there." Now, I submit the entire minutes to the board, if possible.

INMATE:

I would now like to submit the entire minutes to the board if possible.

COMM. RIVERA:

You read it into the record.

INMATE:

Inasmuch, commissioner, as there are statements, certain statements--

COMM. RIVERA:

Well, we will take it into consideration, the entire document and are you submitting this for the record, for our record?

INMATE:

Yes, I am.

COMM. RIVERA:

Or do you want it back?

INMATE:

I am submitting it for your record.

COMM. RIVERA:

What is this, exhibit four, right? Yes, number four, for respondent. The minutes indicate United States District Court, Southern District of New York, United States of America vs. Paul Taylor Rogers, defendant, index number 74CR. 450.

INMATE:

Just as --

COMM. RIVERA:

Let me ask you, was your parole officer aware of all these things you are telling us while under supervision?

INMATE:

Anything in terms of paid employment.

COMM. RIVERA:

Good enough.

INMATE:

Yes, sir. Where some of the community activities, which I volunteered free time --

COMM. RIVERA:

Long as it didn't involve violations, you were free to do acts, those acts.

INMATE:

Yes, sir. If I may, now I would like to refer to some of the activities and reports relative to me since I had been in federal custody and also briefly indicate what my understanding of my current status is in relation to that.

COMM. RIVERA:

Yes, I would appreciate it if you went into that. I certainly would.

INMATE:

I would like to begin.

COMM. RIVERA:

Make sure you have every chance to say everything that is important, but I would appreciate it if you would make it brief as you can because we have a lot of other cases to hear. We do not want to steal time from you to give to others, but we want to give you a fair amount of time that we want to do. Ok?

INMATE:

Yes, sir.

COMM. RIVERA:

So, be as brief as you can and proceed.

INMATE:

May I present to the board without reading it, I am sure that the board may read it themselves a brief work progress report from (West Street?) prior to sentencing from the supervisor that I worked for there. This is merely to indicate that although unsentenced prisoner does not have to work, I want to show what I have done and I have two copies.

COMM. RIVERA:

This is exhibit five, document for caseworker, Mr. Hassen in which it is indicated Mr. Rogers was doing voluntary work and that he performed quite well in that capacity as a clerk and that in the opinion of Mr. Hassen, he relates well to fellow inmates in this document it is number five, isn't it?

INMATE:

Yes, sir.

COMM. RIVERA:

Proceed. You presented some exhibits. I am going to have to keep a record so I will remember, OK?

INMATE:

I should also like to present to the board a memorandum written from Mr. Fred Shriver, Acting Supervisor, Central Dental Laboratory of Louisburg.

COMM. RIVERA:

Since these are short, why don't you read into the record and that would obviate having to review it and once you have read it and the repetition of the thing --

INMATE:

Yes, sir.

COMM. RIVERA:

And I will put in the record the pertinent parts.

INMATE:

I would like to summarize the contents of the this one as much as it is a lengthy one, it is dated 9/12/74, from Louisburg. Mr. Shriver said I firmly believe that this man is one of the best clerks and one of the best workers ever to pass through the Central Dental Laboratory. Then indicated the job duties. To my knowledge this is -- subject is also quite active in institutional group. He is editor of the Toastmaster Newsletter and has taken much interest in fund raising for the orphans sponsored by this club. He is also a member of the Holy Name Society, who is banquet committee he serves on. In addition, he is a regular contributor to the institutional

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paper, The Friday Flyer. Subject has evidence to me very strong feelings for his loved ones and desire to maintain his family obligations to the fullest extent. I commend him to you for his diligence, willingness and spirit to cooperate during his tenure at C.D.L. This is an excerpt (that-and?) I have one copy.

COMM. RIVERA:

This is exhibit six.

INMATE:

Similarly, a memorandum from Mr. James Kaiser to Mr. William Bastress, caseworkers, dated 9/16/74, from Louisburg Penitentiary. Since this is brief, I will accept your suggestion and read it. I should like to inform you of my obligation regarding the above named subject. Subject was assigned as central dental laboratory clerk on August 12, 1974. Since that time, he has made himself an outstanding asset to the functioning of the Central Dental Laboratory. He performs all work assignments with diligence, zeal and confidence, which is far-beyond the normal call of duty. He evidences maturity and ability to function with a minimum of supervision. He is extremely active in institutional club activities and relates very well both to staff and fellow inmates. I would not hesitate to recommend him to any private employer. I see in this man a determination to better himself and to provide for his loved ones, with whom he maintains close ties.

(CON'D)

INMATE: (CON'D)

I might also add that I find his behavior to be exemplary and would mostly certainly recommend him for a meritorious good time except that he may not be credited with this time, due to the pendency of the study now being conducted under number 4208B. Should you have any further question in this regard, please feel free to communicate with me.

COMM. RIVERA:

We will accept that document as exhibit seven.

INMATE:

I have several copies of this, commissioner.

COMM. RIVERA:

Thank you.

INMATE:

I should also like to hand to the commissioners achievement, certificate of achievement, Louisburg, Pennsylvania. This certifies that Paul Taylor Rogers has satisfactorily completed in the field of general education of real estate principles. This certificate is hereby issued this 7th day of September 1974.

COMM. RIVERA:

Exhibit eight.

INMATE:

I should also like to hand to the commissioner, copies of a letter from Dominick Bonomo, dated Louisburg, Pennsylvania, September 27, 1974. If I may summarize it. The first paragraph is a description of what Toastmasters is. Toastmaster is a nationwide organization which provides its members with a professionally designed program to improve their abilities and communication and to develop leadership and executive potential through training, education and community action. Mr. Rogers is currently editor-in-chief of a weekly newsletter, The Spollyon, which is presently in international competition in the Toastmaster Top Ten Club, (bows?) in contest. He has also contributed many articles to this newsletter. In addition, he has served on the membership and the tennis committee and has

worked in an advisory capacity on the education committee. In his context, he is preparing a communication syllabus to be used in a drug abuse program here at Louisbug. In short, I can commend him as an extremely competent and dedicated individual who has already made his mark with us. Should you have any further questions in this regard, please feel free to contact me.

COMM. RIVERA:

All right, these documents all pertain to your adjustment and progress made while in custody of the federal penitentiary, doesn't it?

INMATE:

That is correct, sir. I have one final document.

C

COMM. RIVERA:

Couldn't we stipulate you have made this kind of adjustment so far from the documents for the sake of avoiding repetition?

INMATE:

Yes.

COMM. RIVERA:

But since you have only one more to submit, I would be happy to hear you.

INMATE:

This is a brief memorandum, which I will not read.

COMM. RIVERA:

We will accept the one you gave us as exhibit eight.

COUNSEL:

Exhibit nine, commissioner.

INMATE:

To Mr. Bastress from Mr. James, caseworker relative to myself, (CON'D)

INMATE: (CON'D)

dated 9/17/74, from Louisburg.

COMM. RIVERA:

Thank you, very much.

INMATE:

Thank you, commissioner.

COMM. RIVERA:

Accepted as exhibit ten. Thank you. Anything else in mitigation of your involvement, anything you want for us to consider, because this is all that we are addressing ourselves to today.

INMATE:

Yes, sir. If I may be brief, I would like to present to the board a copy of a letter written to the Honorable Lawrence Pierce, U.S District Court, Southern District of New York.

COMM. RIVERA:

Is that the sentencing judge?

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INMATE:

Yes, a letter was written by me to the judge explaining --

COMM. RIVERA:

Prior or subsequent to sentencing?

INMATE:

Prior to sentencing.

COMM. RIVERA:

Does that have to do with the matter in which sentencing was modified, changed or mitigated, whichever?

INMATE:

No, sir.

COMM. RIVERA:

We will hear it.

INMATE:

This pertains to circumstances surrounding the involvement on federal charges.

COMM. RIVERA:

That is precisely why the judge modified the sentence, hearing the circumstances of the mitigation thereof for the sake of brevity, we can take the knowledge that the judge must have learned of extenuating circumstances, at least, but if there is anything specific you want to bring to our attention, be brief and tell us.

INMATE:

Well, I would like to present it to the board for conclusion.

COMM. RIVERA:

Why can we read it and judge it in its entirety?

INMATE:

Absolutely.

COMM. RIVERA:

That is what I am suggesting. This is exhibit eleven, right? Good enough. I would say that from all the documents, this would be one of the most important. This is the one the judge took into consideration when he modified the sentence from ten years to eighteen months.

INMATE:

Excuse me, sir, the sentence was modified from five years.

COMM. RIVERA:

Thank you for correcting me. Mr. Zuckerman, is it five?

COUNSEL:

I do not know.

COMM. RIVERA:

Be that as it may, good time, a good amount of time was taken off the sentence. Anything else at this time?

INMATE:

I would like to --

COMM. RIVERA:

This was prepared by you?

INMATE:

Prepared by me, yes.

0014

COMM. RIVERA:

Exhibit eleven, by inmate. Proceed.

INMATE:

I would like to finally present what my understanding is that the

federal authorities have in mind at this point.

COMM. RIVERA:

I have a couple of questions I wanted to ask you about that, but I am waiting for you to finish your presentation.

INMATE:

Yes, sir.

COMM. RIVERA:

I am sure my colleagues have the same questions, if not similar to mine in their minds also, but proceed. We would like to give you every chance.

INMATE:

Thank you, very much. I would like to point out that the commissioners are aware I am in Danbury, which is a medium custody facility and despite the presence of a New York State warrant, I do have medium custody classification, which is in the federal system, I don't know whether the commissioners are familiar with which is a classification for work outside the walls without close supervision.

COMM. RIVERA:

We are aware of that.

INMATE:

Just indicated it and do have a verification.

COMM. RIVERA:

We are aware of that.

INMATE:

Finally, I was in an interview with a case manager involved in my case, Mr. Daniel Miller. Mr. Miller indicated to me and is open for verification on this that should the board see fit to reinstate me to parole their plans for me would include transfer to community training center.

COMM. RIVERA:

Our board?

INMATE:

Your board, yes.

COMM. RIVERA:

I am listening.

INMATE:

Plan to transfer me to a community treatment facility or halfway house within the immediate future. Naturally dependant on the action of the members of this board.

COMM. RIVERA:

M'm h'm.

INMATE:

So that it would seem to me not to interpret but possibly to elucidate on what they are saying that their feeling is that I do, at this time present no problem in terms of returning to the community.

0015

COMM. RIVERA:

You are talking about in relationship to your predicament in the federal authorities?

INMATE:

That is correct. They obviously can not address themselves to the other.

COMM. RIVERA:

That is what I wanted to have clear in my mind that you're thinking is.

INMATE:

That at this time it seems to be their plan or was indicated that is their plan for future depending on the action of this board. I would say that is it.

COMM. RIVERA:

If that is your presentation, I would say you did quite well, per se. I commend you for that. Now, I have a question. How much time do you owe your federal sentence?

INMATE:

The maximum expiration --

COMM. RIVERA:

It was reduced to eighteen months.

INMATE:

That is correct.

COMM. RIVERA:

What time do you owe them?

INMATE:

There are three answers to that. Unfortunately, because of the way the federal time is structured. The sentence, the eighteen months itself is up some time in November. The maximum expiration date with good time is July 2, 1975. If I were to be transferred to a CTC, that would be effectuated some time in March, so as to how anywhere from three to six months in the CTC Program --

COMM. RIVERA:

We do not know which of these variances will actually take place.

INMATE:

That is correct, sir.

COMM. RIVERA:

According to the report we have by the federal agent, they compute your time in the neighborhood of eight months without the circumstances. How much time do you owe the state?

INMATE:

Depending upon their --

COMM. RIVERA:

I have a report, I just want to know if you are aware of the time element in your present state sentence?

INMATE:

Assuming the retroactive violation and --

COMM. RIVERA:

By that, you mean delinquency?

INMATE:

Yes, sir.

COMM. RIVERA:

I like it that way better.

INMATE:

I would say fifty months or fifty one months or something like that.

COMM. RIVERA:

M'm h'm, anything else?

INMATE:

No, sir.

COMM. RIVERA:

Does that conclude your presentation, sir? Any questions?

INMATE:

I think Mr. Zuckerman has just come up with a point. I had indicated what my interpretation of the thinking of the federal people is concerned and I think perhaps I should say a word as to what my own thinking is pertaining to myself is at this time and in very general terms, obviously, the record and the circumstances before my original state incarceration was far from good. I think that there was significant progress made during the shortly under three years I was on New York State Parole. I also think in terms of the fact that the crime itself occurred two years ago that there again has been a two year lapse that should this board see fit to reparole me, I would be in dual custody for a period of time and also keeping in mind that with the federal violation there is no credit for time earned on the street. I really think and I think that the caseworker at Danbury agrees with me that there is little likelihood of any repetition of the type of thing that --

COMM. RIVERA:

I do not know if we -- you told me about the amount of time you think you owe in the state sentence that you are aware that there is some time element there which you may be credited with. Don't take this as a promise. It was brought to my attention that of all the total time there is time that may be credited to you, but that we couldn't compute time. You can rest assured that we do not want you to do one more day than you have that you'll be credited for every hour ^{that is} coming to you and I want you to be aware of the difficulty facing us in making a decision in your favor. Not only can we not grant parole release to anybody under sentence, but this is even a little the gravity is a little greater in your case where you're under sentence of another jurisdiction. With that said, I think Mr. Gilbride has a question.

COMM. GILBRIDE:

Mr. Rogers, it is quite apparent and well documented with papers that you presented and the history of parole supervision presented by the parole officer that many of the things you have done on the street were very beneficial and that you have had and did offer a lot of knowledge and expertise and you have done very well in the institution, but can you explain to me how come you reverted to crime?

INMATE:

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Not explained, I can describe the circumstances very briefly because they are detailed in the letter to the Judge Pierce and is rather lengthy and complex, but I would summarize them as briefly as possible. When I was in the University of Wisconsin, when I was very young, I had occasion to visit Puerto Rico and at that time a woman whom I was co-habiting came pregnant. I was in New York. I was a young boy

myself. I was sixteen or seventeen and it was informed of the birth of the boy, but didn't think too much of it and there were no more contacts. The boy was in Puerto Rico and I subsequently married another woman in '61. There was no contact. My second job on release was in a Harold Riggs Halfway House for youngsters coming out to Rikers Island and it developed that one of the boys in the house was my son by this woman from Puerto Rico. He naturally had his own problems coming out of Rikers Island and whatnot and we worked with him to help him get on the right path in terms of his own problems and securing training a job. (CON'D)

INMATE: (CON'D)

He was married in '71, end of '71, beginning of '72. His wife gave birth to a son, who is now my namesake. The baby was born with leukemia. This was at the period I was working at the drug program, Dr. Skolar's (phonetic) drug program. We had physicians, private physicians and the bills ran up and I was making a good salary, I am not going to say I wasn't. I was making 13,500 there, but the financial thing became so pressing and a opportunity arose and it involved three checks, not one as the conviction states.

COMM. RIVERA:

Yes.

INMATE:

I thought I would make that clear. It involved three checks and this was the extent of the involvement.

COMM. GILBRIDE:

What was the total amount of the three checks?

INMATE:

Well, the government claims \$350, but I think they are being charitable. I think they were closer to 800.

COMM. RIVERA:

Income tax checks?

INMATE:

Yes, sir.

COMM. RIVERA:

Got that through another fellow attending some kind of clinic?

INMATE:

Yes, sir, methadone program. Yes, sir.

COMM. RIVERA:

Taking methadone?

INMATE:

No.

COMM. RIVERA:

What were you doing?

INMATE:

Director of services.

COMM. RIVERA:

You were working there? Interesting, you were serving time for the state for the same kind of crime?

INMATE:

No!

COMM. RIVERA:

What were you doing time in the state for? I thought also it had to do with forged checks?

INMATE:

No, sir, robbery.

COMM. RIVERA:

Robbery? You do have a history of forged checks before?

INMATE:

Yes, sir.

COMM. RIVERA:

That is what I thought. One way or another I thought I saw that in the record and wanted to make sure whether the time you're doing for this now was forgery was in your past history, Mr. Rogers. Mrs. Jones, any questions? Oh, are you finished, Mr. Gilbride?

COMM. GILBRIDE:

Yes.

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COMM. RIVERA

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COMM. JONES:

No further questions.

COMM. RIVERA:

Again, I commend you. You did well within your limitations. Of course this is not your profession and I agree with Mr. Zuckerman when he said you could proceed pro se, I agree, you did very well. That is all.

INMATE:

How do I find out about the board's decision? Will I find out here or find out in a letter --

COMM. RIVERA:

It is our custom and policy we do not render or do not give the knowledge of the decisions until such a time as the board has left an institution. Not wishing to depart from that policy, I imagine that the decision will be mailed to you. We will mail Mr. Zuckerman a copy so he can present it to your attorney of record. All right?

DECISION:

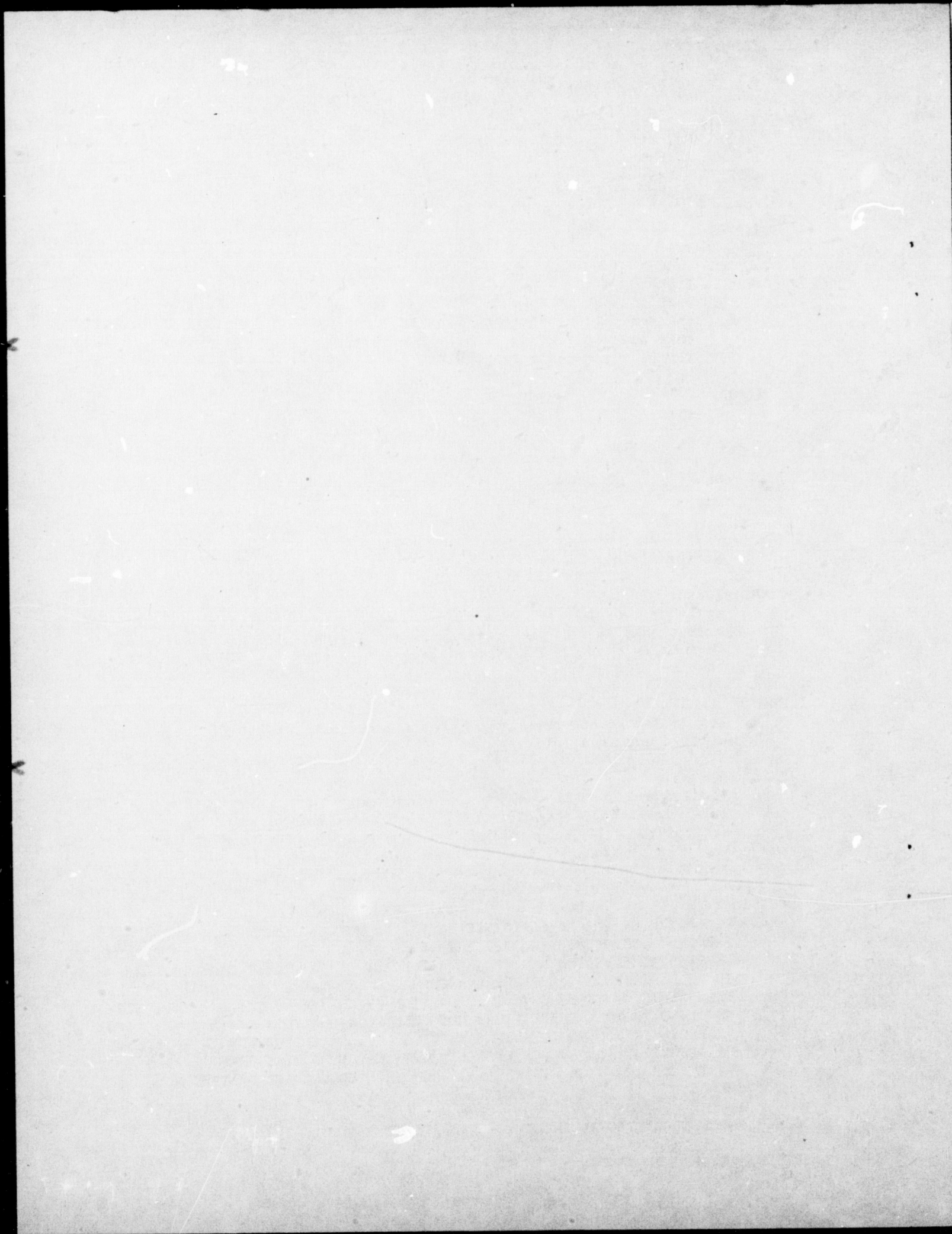
VIOLATION OF PAROLE SUSTAINED BY VIRTUE OF CONVICTIONS AND ADMISSIONS. PAROLE IS REVOKED. THE SUBJECT IS TO APPEAR FOR RELEASE CONSIDERATION AT SUCH TIME BY THE NEW YORK STATE BOARD OF PAROLE AT SUCH TIME AS HE IS RELEASED FROM THE FEDERAL AUTHORITIES TO THE STATE PAROLE WARRANT THIS DECISION IS MADE IN THIS FASHION BY VIRTUE OF THE DIFFICULTIES INVOLVED IN THAT SUBJECT HAS NOT BEEN RETURNED TO A STATE CORRECTIONAL FACILITY AND IS CURRENTLY SERVING A FEDERAL SENTENCE IN A FEDERAL PENITENTIARY AND AS THE RECORD SHOWS IN THE MINUTES, THE SEVERAL VARIANCES IN WHICH HIS RELEASE FROM THE FEDERAL AUTHORITIES WOULD TAKE PLACE.

GREEN HAVEN CORRECTIONAL FACILITY - 1/28/75

RIVERA, GILBRIDE, JONES

0019

BZ:MM/cw



STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

CAROL DONOHUE , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondents-Appellees Regan and Preiser herein. On the 22nd day of December , 197 5, she served, the annexed upon the following named person :

WILLIAM J. GALLAGHER, ESQ.
The Legal Aid Society
Federal Defender Services Unit
509 United States Court House
Foley Square
New York, N. Y. 10007

Att: Phyllis Skloot Bamberger
Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by her for that
purpose.

Carol Danbe

Sworn to before me this
22nd day of December , 1975

Assistant Attorney General
of the State of New York